# Brief in Support of Petition For Writ of Certiorari

**Opinions of Courts Below**

No opinions were made nor filed by either of the courts below. The West Publishing Company had not reported the case up to and including its April 3rd, 1944, Federal Reporter Advance Sheet.

Jurisdiction.

1. The date of the judgment to be reviewed is February 14, 1944, and the date of the denial of petition for rehearing thereon is March 17th, 1944. The last day for filing this petition for writ of certiorari is April 21st, 1944 (which excludes Sundays) as provided by rules XI and XIII promulgated for criminal cases May 7th, 1934. See 54 Sup. Ct. Reporter xxxix.

2. A statement as to jurisdiction is contained in the foregoing petition (P. 6 herein), and the same is hereby adopted and made a part of this brief. See T. R., Pages 17, 18, (Grounds for Appeal); T. R. 2, 3, 4 (Indictment); T. R. 38, 39, 43, 45, 46, 47, 49, 86, 87, 88, for some of the Constitutional questions raised.

3. The principal case believed to sustain jurisdiction herein is Nick Falbo vs United States reported in 88 L. Ed. 248.

Statement of the Case.

This has already been stated in the preceding petition under I, which is hereby adopted and made a part of this brief.

## Specification of Errors

1. The trial court erred in holding that the only issue of fact in the case at the trial was the question of whether the defendant (appellant) did or whether he did not report for the final type physical examination; and the Circuit Court of Appeals for the Ninth Circuit erred in failing to reverse said holding and the judgment rendered in said action. See T. R. 17, 25, 47, 85, 88.

2. The trial court erred in excluding evidence offered on behalf of defendant tending to show that he was a regular and an ordained minister and that he believed himself to be entitled to exemption as such; and the said Circuit Court of Appeals erred in failing to reverse the rulings of the trial court in this respect and in affirming the judgment of the trial court. See T. R. 95, 92, 90, 91 (Defendant's Exhibits for Identification No. "A" and "B"; T. R. 84, 85, 56, 30, 29, 17. (Notice that the Reporter's transcript of the Trial proceedings is included in the transcript of the record.)

3. The trial court erred in not permitting defendant to testify as to what he thought would happen to him according to his religious belief in the event that he should cooperate with the government in the war effort by reporting for the physical examination or at all; and the said Circuit Court of Appeals erred in not reversing the rulings of the trial court in this respect, and in failing to reverse the judgment of the trial court because of these erroneous rulings.

See: T. R. 43, 44, 46 (last half page), 38, 39, 17, 25, 83, 84 (evidence showing part of defendant's religious belief pp. 83, 84 T. R.)

4. The trial court erred in refusing to give defendant's requested instructions numbers four (4) and five (5) re-

lating to defendant's theory of defense as being lack of criminal intent and of feloniousness in the mind of defendant, in failing to report for the physical examination; and the said Circuit Court of Appeals erred in failing to reverse the rulings of the trial court in this respect, and in affirming the judgment of the trial court.

See: T. R. 31, 30, and cases there cited page 31; T. R. 38; 56, (exceptions); T. R. 37, cases there cited; T. R. 31, 32 and cases there cited; T. R. 50 and cases there cited; T. R. 54 and cases there cited; The trial court failed to instruct the jury on the question of intent. See T. R. 95 to 102 for the instructions given. See T. R. 101 for instruction that rejected testimony must be disregarded by jury. T. R. 55 and cases there cited.

## ARGUMENT

Summary of the Argument.

### POINT A.

This point is based on specification of error No. 1 (page 12 ante).

**THE HOLDING OF THE TRIAL COURT THAT THE ONLY ISSUE OF FACT IN THE CASE AT THE TRIAL WAS WHETHER DEFENDANT DID OR WHETHER HE DID NOT REPORT FOR THE PHYSICAL EXAMINATION IS REVERSIBLE ERROR.**

#### Argument

This ruling of the trial court denied to defendant all his defenses. It denied him the opportunity to tell the jury why he did not report for the physical examination; it denied him the chance to present to the jury his theory of defense: LACK OF CRIMINAL INTENT, LACK OF FELONIOUSNESS, LACK OF WILFULNESS, LACK OF UNLAWFULNESS IN THE FAILURE

TO REPORT FOR THE EXAMINATION: it, in effect, denied him his Constitutional right to testify guaranteed by the due process clause of Amendments to Constitution of the United States, Article V, because defendant had admitted that he did not report for the examination, and there was therefore nothing else that he could testify to under the ruling complained of herein.

See: United States vs Hoffman 137 Fed. (2nd) 416, 419, for decision of July 26, 1943, for following:-

"This (an instruction to jury) seems proper; the statute (Selective Training and Service Act of 1940) requires something more than mere failure, for the accused must knowingly fail or neglect to perform statutory duty. 50 U. S. C. A. Appendix Sec. 311; United States vs Trypuc 2nd Circuit June 11th, 1943, 136 Fed. 2nd 900. *That the Court interpreted this language as meaning the usual criminal intent seems also correct.* Cf Nosowitz vs United States, 2nd Ct. 282 Fed. 575, 578; United States vs Murdock 290 U. S. 289, 54 Sup. Ct. 223, 78 L. Ed. 381; Townsend vs U. S. 68 App. D. C. 223, 95 Fed. 2nd 352, certiorari denied 303 U. S. 664, 58 S. Ct. 830, 82 L. Ed. 1121."

See: 95 Fed. (2nd) 357, 358 Townsend vs United States (APP. D. C.) for definition of the word "wilfully" and lawful excuses for failing to obey a mandatory statute; and many cases there cited.

**POINT B**

This point is based on specification of error No. 2 (page 12 ante).

**THE REFUSAL OF THE TRIAL COURT TO PERMIT DEFENDANT TO TESTIFY THAT HE IS AN ORDAINED AND REGULAR MINISTER, AND EXCLUDING OTHER EVIDENCE TO THIS EFFECT OFFERED ON BEHALF OF DEFENDANT IS REVERSIBLE ERROR .**

**Argument**

One theory of defense at the trial was lack of criminal intent, feloniousness, wilfulness or unlawfulness in the mind or actions of defendant. Every defendant has a right to testify as to why he did or did not do the thing charged against him, whether he have a valid, lawful defense or not, as guaranteed under the due process clause in Article V Amendments to the United States Constitution. If defendant honestly believed that he was exempt as a minister whether ordained or not, he had the RIGHT TO TESTIFY TO THAT FACT. The ruling of the trial court denied him this right.

And, further, the evidence offered in the form of exhibits and other testimony along this same line tended to corroborate any testimony the defendant might have been permitted to give at the trial on the ministerial status, and would have strongly tended to show lack of criminal intent, and good faith on the part of defendant as well as going to the question of culpability and criminality of defendant's nature which are vital matters on questions of probation and which the court should have heard for these latter reasons, as well as the jury for passing on guilt or innocence.

See citations of authorities under POINT "A", page 13 ante.

On the question of whether or not the trial court has jurisdiction to inquire into the actions of the local draft board in classifying the registrant defendant in 1A instead of IVD, minister status, the Supreme Court has taken a definite stand in the Nick Falbo case against the contentions of defendant herein. In Justice Murphey's dissenting opinion in the Falbo case he stresses the reali-

ties of the situation, and, this briefer believes, properly so. The Jehovah's Witnesses would never be good soldiers in this war—until they change their beliefs. The army for a long time weeded out all persons having criminal tendencies and even now discourages their enlistment in all branches of the service. But these witnesses have no criminal tendencies. They are non-violent. They do not advocate the use of any kind of violence except self defense, which the law accords to all persons. They claim neutrality in the present war, and they believe that Almighty God and his Son Jesus Christ are the only leaders they will follow in ANY war. They were murdered and imprisoned in the Axis countries for their beliefs. They have stood a greater test than that of acid wherever they have been tested, and they are found to be GENUINE. Why should not the Highest Court in our Land follow our Constitution and permit them to have the free exercise of their religion as long as they honestly adhere to their principles?

Sergeant York is the Great American example of Conscientious Objectors.

There may be many Sergeant Yorks among the Jehovah Witnesses, serving the Great Ideals of America in future wars and domestic difficulties.

It is very refreshing to this briefer to find among his fellow men in America a religious sect willing to die for their convictions. This kind of people is all too seldom met during times of peace. America should pause, reflect, and accord to them their constitutional rights in time of war. Maybe they are RIGHT.

See: 95 Fed. 2nd 357, 358 ante for definition of "wilfully."

## POINT C

This point is based on Specification of Error No. 3. See Page 12 ante.

**THE REFUSAL OF THE TRIAL COURT TO PERMIT DEFENDANT TO TESTIFY AT THE TRIAL AS TO WHAT DEFENDANT THOUGHT WOULD HAPPEN TO HIM UNDER THE TENETS OR DOCTRINE OF HIS RELIGIOUS BELIEF IF HE SHOULD CO-OPERATE WITH THE GOVERNMENT IN THE WAR EFFORT IS A DENIAL OF CONSTITUTIONAL RIGHT TO TESTIFY AND OF THE RIGHT TO PRESENT TO THE JURY FACTS SHOWING LACK OF CRIMINAL INTENT, LACK OF WILFULNESS, LACK OF FELONIOUSNESS, LACK OF UNLAWFULNESS IN DEFENDANT'S FAILURE TO REPORT FOR EXAMINATION; AND THE EXCLUSION OF THIS EVIDENCE DENIES TO DEFENDANT THE CONSTITUTIONAL RIGHT TO EXERCISE HIS RELIGION AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES, ARTICLE I AMENDMENTS; AND DENIES DEFENDANT THE OPPORTUNITY OF SHOWING TO THE JURY THAT HIS FAILURE TO REPORT FOR EXAMINATION WAS DUE TO RELIGIOUS RESTRAINT AND FEAR OF CONSEQUENCES TO HIS BODY AND SOUL: AND IS REVERSIBLE ERROR.**

### Argument

That part of the above proposition of law applying to criminal intent has been treated elsewhere in this brief and the briefer hereby adopts and incorporates herein the citations of authorities and arguments set forth under Points A, B, and D herein, as applying to this phase of this proposition of law.

Amendments to the U. S. Constitution, Article I, provides that Congress shall make no law prohibiting the

free exercise of religion. Article V of said amendments provides that persons charged with crime shall have due process of law. The bare legal right of a defendant to testify has been discussed under Point B in this brief. But this bare legal right when vitalized by a claim of religious restraint, and a fear of what Almighty God might do if the statute is obeyed, becomes a very fertile field for discussion; with multiple force, this bare legal right to testify, to tell his whole story, his every reason for disobeying the statute, becomes an irrepressible issue or question when reinforced by a claim of religious right under the Constitution. Especially so is this true because the whole policy of the criminal law in America has been to permit all persons charged with crime to testify—due process of law. To deny the right to defendant in this case to tell WHY he did or did not do the act charged against him, is the same as denying to him the right to testify. If he feared the loss of a chance at eternal life should he obey the statute, which is the situation here, he should have been permitted to tell the jury his position. In all self defense cases men are permitted by law to take human life when they believe that their own mortal lives are in grave danger of being lost. Why should not the Supreme Court of the United States extend the law of self defense to protect those who believe that they are about to lose their souls and their bodies throughout eternity? There is ample power for the Court to do so, under the Amendment Article I of our National Constitution, which guarantees the free exercise of religion. Defendant's religious belief is set forth in Hebrews, Chapter 6, Verses 4, 5, 6, Ephesians Chapter 6, Verse 12; and Matthew 16 Verse 26, all from the Bible; summed up in the latter citation as follows:

> "For what is a man profited, if he shall gain the whole world, and lose his own soul? OR WHAT

SHALL A MAN GIVE IN EXCHANGE FOR HIS SOUL?"

If obedience to a man made law will destroy one's own soul, as this defendant believes, should the Constitution of the United States wherein it restricts the Congress against prohibiting the free exercise of religion, be so applied as to throw a protecting shield around such a person? This briefer believes that the Constitution was made, in part, for just such a purpose. It is intended to be a protector of minorities as well as majorities. The minority of today is the majority of tomorrow. Truth will prevail. If this defendant knows the TRUTH and is complying with it, all the constitutions, laws, armies, navies and man made institutions cannot prevail against his position, eventually. But if he is wrong, he still has the constitutional guarantee protecting his belief, and a patient, noble people and nation mighty in majestic splendor of honest fidelity to our own basis laws, will eventually be rewarded by the undying loyalty and love of those sincere but misguided persons, who would be eveneutlly convinced of their error. Tolerance has made our nation the greatest of all. Intolerance has destroyed half the world within the past four years.

See: 95 Fed. 2nd ante PP 357, 358 for definition of "wilfully."

**POINT D.**

This point is based upon Specification of Error No. 4 See Page 12 ante.

**THE REFUSAL OF THE TRIAL COURT TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS, NUMBERS FOUR (4) AND FIVE (5) RELATING TO DEFENDANT'S THEORY OF DEFENSE AS BEING ABSENCE OR LACK OF CRIMINAL INTENT, WILFULNESS OR FELONIOUSNESS**

**IN THE MIND OF THE DEFENDANT, AND THE FAILURE OF THE TRIAL COURT TO GIVE ANY INSTRUCTIONS TO THE JURY ON THE QUESTION OF INTENT OR CRIMINAL INTENT ARE REVERSIBLE ERROR.**

**Argument**

The citations of authorities contained in the argument under Point A of this brief apply with equal force in support of this Point D. See page 13 this brief, quoting from United States vs Hoffman, 137 Fed. (2nd) 416, 419. See T. R. 96-102 for the instructions given to the jury. No instruction was given by the trial court on the question of criminal intent. The trial court refused to give those instructions offered by the defendant and exceptions were taken to the refusal. See T. R. 56.

The offered instructions were followed by appropriate citations of authorities supporting their respective theories. See: T. R. 31, 32, 37, 50, 55, wherein these matters of intent and the right of the defendant to present his theory of his defense to the jury and appropriate citations of authortities were all called to the attention of the court before the ruling refusing the instructions was made. These authorities cited were reinforced by citations to the said Circuit Court of Appeals as follows: Jenkins vs United States 56 Fed. (2nd )2, 53 Sup Ct. 81, 287 U. S. 628; Christensen vs United States 90 Fed. (2nd) 152; Baer vs United States 293 Fed. 843, 54 App. D. C. 24; State vs White 46 Ida. 124, 266 Pac. 415; People vs McRoberts 81 Pac. 734, 1 Cal. App. 25; "Criminal Law" Digest Pac. Reporter System, Sec. Key No. 772 (5) and (6). An instruction on intent should always be given in a criminal case when the same is requested. State vs Steele (Wash) 273 Pac. 742 (745); People vs Doble 265 Pac. 184 (190).

This latter case holds that in criminal cases the defendant is always entitled to a declaration of the principles of law governing his case, by the court to the jury.

The foregoing citations of the ordinary criminal law are, in this case buttressed by the claim of constitutional right under Amendment I of the United States Constitution to the free exercise of religion in obedience to God's Laws in preference to man made laws, the reason given by defendant for his failure to report. See. T. R. 83.

The protection of constitutional rights should not depend upon expediency. The Court herein should crystallize the well established principles of law protecting persons charged with crime, into a ringing clear cut re-definition of the constitutional right of free exercise of religion so that it will at least be in line with, if not actually fortifying the rights accorded to ordinary criminals in the daily experiences of our courts all over the land.

An intelligent person actually believing that he was trading a chance for eternal life for a mess of pottage in the form of a few short years of mortal life, by cooperating with the government in the war effort would be violating all the innermost values of his spiritual being if he should yield his principles. HIS religion would be thereby destroyed. HIS government would receive in return for its use or abuse of power a man devoid of spirit and perhaps filled with a silent resentment. He acts in self defense, what he considers defense of his spiritual life, in failing to cooperate with the government.

See: Townsend vs United States (D C. App) 95 Fed. 2nd 357, 358 for Definition of "wilfully" and cases there cited.

## CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the said decision.

**Thomas O. Marlar**

.....

Counsel for Petitioner.

**Harry J. Valentine**
**Ralph Estrada**

By.....

Of Counsel, for Petitioner.

Address of Counsel for Petitioner: Room 220 First National Bank Building, Phoenix, Arizona.